IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2724 OF 2005

Shivaji Shankar Jadhav ...Petitioner

Vs.

Sangita Shivaji Jadhav & Ors. ...Respondents

Shri A.M.Kulkarni for the Petitioner.
Shri K.S.Patil for the Respondent No.1.
Shri Rajesh More, A.P.P for the State.

CORAM : A. S. OKA, J.
DATE : OCTOBER 07, 2006.

JUDGMENT:

1. This Petition was heard finally on the last date. The Petitioner is the husband and the first Respondent is the wife. An Application was made by the first Respondent for herself and on behalf of the second Respondent who is her minor son for grant of maintenance under section 125 of the Code of Criminal Procedure, 1973(hereinafter referred to as the said Code of 1973). By order dated 11th January, 2005, the learned Judicial Magistrate First Class allowed the Application and directed the Petitioner to pay maintenance at the rate of Rs.500/- per month each to the first and second Respondent from the date of Application. According to the Petitioner, the said order was an ex-parte order and therefore, he filed an Application for setting aside the ex-parte order. In

the meanwhile, the first and second Respondents filed a revision Application for challenging order dated 11th January, 2005 for claiming enhancement. The Application for setting aside the order made by the Petitioner was rejected by order dated 30th June, 2005 on the ground that the revision Application filed by the first and second Respondents was pending in the Sessions Court. It is not in dispute that the said order dated 30th January, 2005 was challenged by the Petitioner by filing a revision Application. In the said revision Application there was a delay. It is an admitted position that the Application for condonation of delay was rejected by the Sessions Court and no further proceedings have been carried by the Petitioner as regards the order dated 30th June, 2005.

2. By the impugned Judgment and Order, the learned 3rd Additional Sessions Judge, Sangli allowed the revision Application filed by the first and second Respondents and enhanced the maintenance amount granted to the first Respondent to Rs.1200/- per month and to the second Respondent to Rs.800/- per month. The learned Judge directed the Petitioner to pay the amounts at the said rate from the date of filing of original Application for maintenance. The said

original Application for maintenance was filed on 23rd August, 2004.

3. Shri Kulkarni appearing for the Petitioner submitted that the court of the learned Magistrate decided the Application for grant of maintenance ex-parte and therefore, no evidence could be led by the Petitioner about his income. He placed reliance on letter dated 25th July, 2005 issued by the District Supply Officer, Sangli to the Petitioner in which it is stated that the Petitioner has been granted licence to sell kerosene by 40 handcarts. The said letter records that every month the Petitioner is receiving commission of only Rs.1,600/-. He submitted that the Petitioner is suffering from HIV positive and he invited my attention to the documents in that behalf filed on the record of this Petition. He submitted that it is impossible for the Petitioner to pay total maintenance of Rs.2,000/- per month considering the fact that his income is only Rs.1600/- per month.

4. The learned counsel appearing for the first and second Respondents invited my attention to the finding recorded in paragraph No.5 by the learned Magistrate in his order dated 11th January, 2005. He submitted that

income of the Petitioner is more than Rs.20,000/-p.m. from the business and from the rent in respect of rooms constructed by him. He submitted that no interference is called for.

5. Before hearing the matter on merits, I had suggested to the Advocates appearing for the parties to have mutual settlement. However, notwithstanding the best efforts made by the Advocates, there could not be any amicable settlement.

6. It is true that the Petitioner was not present at the time of hearing of the original Application filed by the first and second Respondents and therefore, he could not place any material on record as regards his income. In the Criminal Revision Application filed by the first and the second Respondent, there was a specific assertion in paragraph No.6 that the Petitioner is earning Rs.15,000/- to Rs.17,000/- per month from his business of selling kerosene and his property is fetching rental income of Rs.6,000/- per month. The Petitioner filed a reply to revision Application. Except for saying that the Petitioner has a meagre income and that he is required to spent large amount on medical treatment and that he

has other dependant members, nothing further is stated by the Petitioner in the said reply. He has not disclosed his true income from the business of selling kerosene. There is no specific denial in the said reply to the allegation made by the first and second Respondents that he is getting rental income of Rs.6,000/- per month. An opportunity was available to the Petitioner atleast in the revision Application to disclose his correct income. However, the Petitioner has not chosen to disclose his income in the said reply. The income of the Petitioner was a fact which was within his special knowledge. Therefore, no fault can be found if the case of the first Respondent that the income of the Petitioner was Rs.15,000/- to Rs.17,000/- per month was accepted by the courts below.

7. The order dated 11th January, 2005 passed by the Trial Court has attained finality in so far as Petitioner is concerned. The Revisional Court has granted enhancement from the date of the original Application i.e. 23rd August, 2004. Considering the disease suffered by the Petitioner and considering the fact that the Petitioner could not contest the claim in the Trial Court, in my view, enhanced amount should have been made payable from the date of the order i.e.

03rd September, 2005. To that extent the impugned order needs modification.

8. Hence, I pass following order:

(i) The impugned Judgment and Order dated 03rd September, 2005 passed in Criminal Revision Application No.17 of 2005 is modified only to the extent that the maintenance amount mentioned in clause No.(3) of the operative part of the said order will be payable from the month of September 2005.

(ii) Rest of the order passed by the learned Additional Sessions Judge is confirmed. Thus, up to 31st August, 2005, the Petitioner will be liable to pay maintenance as per the order dated 11th January, 2005 passed by the learned Magistrate.

(iii) The Petitioner is directed to pay arrears, if any, within a period of three months from today.

(iv) Rule is partly made absolute in above terms.

(v) No orders as to costs.

JUDGE